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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA

vs.

TODD CARTA

* * * * *

UNITED STATES OF AMERICA

vs.

WESLEY GRAHAM

* * * * *

UNITED STATES OF AMERICA

vs.

JACK McRAE

* * * * *

CIVIL ACTION
No. 07-mc-10057-JLT and
No. 07-12064-JLT

CIVIL ACTION
No. 07-mc-10064-JLT

CIVIL ACTION
No. 07-mc-10066-JLT

BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
MOTION HEARING

A P P E A R A N C E S

DEPARTMENT OF JUSTICE
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Room 6107
Washington, D.C. 20530
for the United States
By: Helen H. Hong, Trial Attorney

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Courtroom No. 20
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
August 22, 2007
11:50 a.m.

CAROL LYNN SCOTT, CSR, RMR
Official Court Reporter
One Courthouse Way, Suite 7204
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P R O C E E D I N G

THE CLERK: All rise for the Honorable Court.

THE COURT: Good morning. Sorry to keep you waiting. Several things happened to prevent me from being here.

THE CLERK: This is MBD matter 07-10057, United States of America versus Todd Carta, and MBD matter 07-10064, United States of America versus Wesley Graham, and MBD matter 07-10066, United States of America versus Jack McRae.

Counsel please identify themselves for the record.

MS. HONG: Good morning, Your Honor. Helen Hong, Department of Justice in the civil division at the Federal Programs Branch on behalf of the government.

THE COURT: Okay.

MR. FARQUHAR: Good morning, Your Honor. Ray Farquhar for the government.

THE COURT: Okay.

MS. KELLEY: Good morning. Page Kelley on behalf of Todd Carta.

THE COURT: All right.

MR. SINNIS: Good morning, Your Honor. Stelio Sinnis. I'm here for Jack McRae and Wesley Graham.

THE COURT: Okay.

MS. MIZNER: Good morning, Your Honor. Judith

1 Mizner on behalf of all three.

2 **THE COURT:** Okay. Anybody else have a special
3 appearance here?

4 Well, sit down, please. We have a lot to get
5 through here. There is a lot I want to understand. And I
6 think -- is someone going to speak for the defendants?

7 **MS. MIZNER:** I am, Your Honor.

8 **THE COURT:** You are. You are all welcome to speak.
9 I just wanted to know whether someone was going to carry the
10 ball.

11 I start off with this facial challenge. And I
12 would like to know what you say the standard is. What you
13 have done is you filed a facial challenge; is that right?

14 **MS. MIZNER:** Yes, Your Honor.

15 **THE COURT:** And you have chosen not to file
16 anything more specific than that; haven't you?

17 **MS. MIZNER:** At this time, yes. This is a
18 challenge that we are saying applies across the board.

19 **THE COURT:** Okay. Now, so tell me what you say the
20 test is. What is the standard? Is it Salerno? What is the
21 standard?

22 **MS. MIZNER:** In terms of the jurisdiction for
23 standing to bring a facial challenge?

24 **THE COURT:** No, that and how do you win? What do
25 you have to prove in order to prevail here?

1 **MS. MIZNER:** Well, I think it depends on the
2 particular issue being addressed. We have raised a number
3 of different challenges.

4 For example, the due process challenges. We are
5 saying regardless of whether or not the statute could
6 conceivably be applied for a class of people, the due
7 process issues make the statute unconstitutional as --

8 **THE COURT:** Well, that is not a facial challenge
9 though.

10 **MS. MIZNER:** It is. We are saying that the statute
11 facially suffers from procedural protections that apply
12 across the board and, therefore, apply to any person as to
13 whom civil commitment is being sought.

14 I would note that City of Chicago v. Morales,
15 footnote 22, addresses the concept of whether Salerno,
16 whether the Salerno test of the statute is inapplicable,
17 under any set of circumstances applies in all instances and
18 I think that the City of Chicago says that it does not.

19 It may be one test. It's not the only test. Just
20 as Blockburger may generally be the test for when you have
21 two statutes that punish the same offense, it is not the
22 only test.

23 And in Chicago v. Morales they looked at the
24 Chicago loitering statute and found that it violated due
25 process. It was a vague and arbitrary restriction on

1 personal liberty even though you could conceive of
2 circumstances where it might apply to certain individuals.

3 I think Lopez and Morrison, which deal with
4 Commerce Clause challenges, also have some bearing on this
5 issue saying that if a statute is outside congressional
6 authority to promulgate, it can't be applied, that it's
7 facially invalid.

8 And here we are saying that there is no enumerated
9 power for which, to which Congress can tag this statute. So
10 it would have been unconstitutional as applied, as applied
11 to all, and facially invalid because it cannot be applied
12 constitutionally. Congress didn't have the power to
13 promulgate it.

14 So I'm saying I guess we meet the Salerno test, if
15 that's the test the Court wishes to apply, because we are
16 saying, for these challenges we are saying that it cannot be
17 applied to anybody, but also suggesting that the Supreme
18 Court in Chicago has said that Salerno is not the only test.

19 I would suggest that the government has parsed out
20 a class of persons who are committed to the custody of the
21 Attorney General pursuant to 4241 and said that it's clear
22 that 4248 would apply to them.

23 **THE COURT:** Well, wait a minute. Yes.

24 (Whereupon, the Court and the Clerk conferred.)

25 **THE COURT:** You will have to excuse me. I have to

1 take this call.

2 (Recess.)

3 **THE COURT:** Everybody, thank you for excusing me.
4 I appreciate it.

5 Getting back, I guess -- let me start all over
6 again in a way.

7 Are you really making an as applied argument to me
8 or is it a facial -- you said -- let me tell you what is on
9 my mind. I think you made the argument that the Necessary
10 and Proper crutch that they may want to lean on really isn't
11 ripe because it is really an exercise of police powers that
12 only a state has the right to exercise. I mean, is that --

13 **MS. MIZNER:** Well, the --

14 **THE COURT:** And then as far as the Commerce Clause,
15 I am going to be asking, you know, if they are relying on
16 the Commerce Clause, what aspect of the Commerce Clause
17 applies here.

18 But I really want to know what your -- what do you
19 want me to do?

20 **MS. MIZNER:** Well, we are saying that, certainly as
21 to any of these three individuals who are being held, who
22 are here only because they are in federal custody for some
23 other reason, that certainly as applied --

24 **THE COURT:** Their custody would normally have
25 ended?

1 **MS. MIZNER:** Yes.

2 **THE COURT:** Go ahead.

3 **MS. MIZNER:** That civil commitment is being sought
4 as to them only because they are in the custody of the
5 Bureau of Prisons. But certainly as applied to them this
6 statute is unconstitutional for the variety of reasons that
7 we state --

8 **THE COURT:** If they had fortuitously been -- walked
9 out the gates of the jail, then this couldn't happen, there
10 would have to have been a whole criminal proceeding
11 initiated if there, indeed, was such a proceeding that was
12 available --

13 **MS. MIZNER:** They could not be civilly committed
14 under 4248 if they walked out.

15 **THE COURT:** Or anything else.

16 **MS. MIZNER:** Or anything else that I'm aware of.

17 But I think that it's also fair to say that they're
18 facial challenges in the sense that we are saying that for
19 the due process arguments and that for the congressional
20 authority arguments, that there is no set of circumstances
21 under which this statute, this particular statute can be
22 held to be constitutional.

23 Congress may have the ability to pass --

24 **THE COURT:** When you are -- forgive me for
25 interrupting you. I know you have got this down cold and I

1 have got a million questions to ask you. If I don't ask the
2 question, I will forget what it was, which I think I just
3 did.

4 (Laughter.)

5 **THE COURT:** Well, go ahead with your argument. I
6 will think of it.

7 **MS. MIZNER:** In terms of the jurisdiction for the
8 facial challenge, I'd also like to address the government's
9 suggestion that Greenwood -- basically as I read --

10 **THE COURT:** Oh, I know what it was that I was going
11 to say.

12 **MS. MIZNER:** Okay.

13 **THE COURT:** When you are making this sort of a
14 facial challenge, do we have to call on you to eliminate
15 every possibility or is it the government's burden once the
16 facial challenge has been made to come forward with some
17 theory where the statute or whatever it is would be saved?

18 **MS. MIZNER:** Is this a burden shifting situation?

19 **THE COURT:** Well, I mean, you are ticking off the
20 Commerce Clause doesn't apply, the Necessary and Proper
21 doesn't apply. You can go to the index of the Criminal Code
22 I suppose and say all the things that don't apply.

23 But is that your burden or is it their burden --

24 **MS. MIZNER:** I think it is --

25 **THE COURT:** -- once you raise it to demonstrate

1 that someplace there is a use of this that is
2 constitutional?

3 **MS. MIZNER:** I think under the Salerno test it
4 would be the government's burden. We have said that it
5 cannot be applied. And we looked at the Commerce Clause and
6 Necessary and Proper Clause as being the areas that we
7 viewed as most likely for the government to try to rely on.

8 **THE COURT:** But they are the ones that --

9 **MS. MIZNER:** Yes, we believe that it is their
10 burden to come forward and show once we have filed a facial
11 challenge.

12 **THE COURT:** All right. Well, let's hear from them
13 then. Go ahead.

14 What reliance do you place on the Commerce Clause,
15 if anything, and the Necessary and Proper? How can you
16 avoid the argument that you are really just exercising
17 police powers that belong to the state?

18 **MS. HONG:** Sure. Certainly. Oh, before I get to
19 the Commerce Clause, I'd just like to address what
20 Ms. Mizner said about the burden and who has the burden to
21 prove that no set of circumstances or under no set of
22 circumstances is the statute constitutional.

23 **THE COURT:** Go ahead.

24 **MS. HONG:** Under United States versus Salerno the
25 Court has written that it's the challenger who must

1 establish that no set of circumstances exists under which
2 the act would be valid. And that would be at 745 -- 481
3 U.S. 745. That's respondent's burden to show that under no
4 set of circumstances is the act a constitutional exercise of
5 Congress's authority. And that's actually for good reason.

6 It is really a corollary to the sort of typical
7 doctrine of the Court deciding a case on the narrowest
8 grounds available. And that each respondent must have
9 standing in effect, must have injury, in fact, must show
10 that the facts of their case showed that a case -- that a
11 statute is unconstitutional. Here respondents cannot do
12 that.

13 Turning to your question about the Commerce Clause
14 and why respondents cannot show that this act is
15 unconstitutional as applied to every individual, Greenwood
16 versus United States answers that question.

17 The act applies to three categories of individuals.
18 The first being persons in the custody of the Bureau of
19 Prisons. The second being persons under the Attorney
20 General's custody under Section 4241(d). And the third
21 being persons against whom all criminal charges have been
22 dropped owing to a mental incapacity or mental illness.

23 The United States Supreme Court in Greenwood versus
24 United States stated that the United States Government may
25 commit, civilly commit individuals under 4241(d) who have

1 been found to be incompetent to stand trial if they also
2 pose a danger to --

3 **THE COURT:** But we don't have that here. In other
4 words, none of the people who are before me now are either
5 committed or against whom criminal charges have been
6 dismissed because of mental condition.

7 **MS. HONG:** The respondents --

8 **THE COURT:** The only thing we have here is somebody
9 who is in the custody of the Bureau of Prisons; isn't that
10 right?

11 **MS. HONG:** But what respondents are asking --

12 **THE COURT:** Is that right?

13 **MS. HONG:** That's correct. No one here --

14 **THE COURT:** So we are not dealing with two and
15 three, we are just dealing with one.

16 **MS. HONG:** That's correct.

17 **THE COURT:** And what is troublesome is that one,
18 relying on one sort of begs the question because the only
19 reason that they are in prison, so the argument goes, is
20 because they are being improperly held.

21 **MS. HONG:** Well --

22 **THE COURT:** In other words, under normal
23 circumstances they should be out the door.

24 **MS. HONG:** Right.

25 **THE COURT:** But this statute gives administrative

1 determination sufficient clout to keep them in jail.

2 Otherwise they wouldn't be in jail.

3 So you are keeping them in jail and then relying on
4 that as being someone who is in the custody of the Bureau of
5 Prisons as Greenwood indicates.

6 **MS. HONG:** Right. And that's not entirely correct.

7 Each of the respondents was lawfully in the custody
8 of the federal government or the Bureau of Prisons at the
9 time they were certified to be a sexually dangerous person.

10 It's only by virtue of the last sentence of Section
11 4248(a) which states that a person's release shall be stayed
12 during the pendency of the certification process that the
13 respondents are still held now.

14 But at the moment that the certification occurred
15 the persons were as required by statute in the custody of
16 the Bureau of Prisons.

17 **THE COURT:** Okay.

18 **MS. HONG:** And what respondents are asking, and
19 your question earlier is are these respondents, do they fall
20 under Section 4241(d) or do they fall under the category of
21 individuals, the third category of individuals specified in
22 the act.

23 What respondents are asking you to do today is to
24 hold that the statute is unconstitutional completely, that
25 on its face Congress has no authority to promulgate this

1 act. But because under the facial test articulated by
2 Salerno there are circumstances under which Congress may
3 without question provide for the civil commitment of persons
4 in its custody, respondents' facial challenge must fail and
5 their motion to dismiss must be denied.

6 **THE COURT:** Well, where do you find that authority
7 on these circumstances? In other words, under the Commerce
8 Clause point, give me a Commerce Clause example that will
9 end the inquiry.

10 **MS. HONG:** Right.

11 **THE COURT:** And then after that give me a Necessary
12 and Proper inquiry that will end, an example that will end
13 the inquiry.

14 **MS. HONG:** If we move beyond the facial question
15 and ask how as applied to these individual respondents is
16 the statute constitutional, that question is answered by
17 United States versus Carey and progeny that discusses the
18 Necessary and Proper Clause.

19 Congress has the authority --

20 **THE COURT:** No, we are talking about Commerce.

21 **MS. HONG:** Yes. And the Commerce Clause informs
22 Congress's Necessary and Proper powers.

23 Here we are suggesting that Congress has the
24 necessary and proper authority in order to properly exercise
25 its Commerce Clause authority because Congress has --

1 **THE COURT:** But what part of Commerce, the Commerce
2 Clause kicks in here? It is not a gun next to a schoolyard.
3 I mean, not everything kicks in; right?

4 **MS. HONG:** No, except Congress has the power to
5 criminalize certain sexually violent conduct and child
6 molestation. There are statutes in Title 18 of the United
7 States Code where Congress has prohibited certain violent
8 conduct under the Commerce Clause.

9 **THE COURT:** Isn't that usually if it is a
10 transportation in interstate commerce? I mean, we are
11 talking about photographs and things like that. Don't they
12 have to travel in interstate commerce?

13 **MS. HONG:** And that's the constitutional, the
14 Commerce Clause hook, that's correct. And United States
15 versus --

16 **THE COURT:** So what is the hook here? These people
17 aren't traveling in interstate commerce.

18 **MS. HONG:** No, it's Congress's authority and power
19 to criminalize such conduct. If Congress has the power to
20 criminalize, for example, the transportation of a child
21 across state borders in order to molest a child, and
22 Congress also has the necessary and proper authority to
23 prevent that future occurrence of that crime, it's precisely
24 what the Court held in United States versus Perry.

25 There the court --

1 **THE COURT:** What would the criminal statute read?
2 What would the crime be?

3 **MS. HONG:** Under, if you look at 18 U.S.C Section
4 2251, 18 U.S.C. Section 2252 there are a number of federal
5 sex crimes that have been proscribed by Congress. So, for
6 example, there is 18 U.S.C. Section 2241 through 2245 which
7 is sexual misconduct; 18 U.S.C. Section 2251 through 2252,
8 which proscribes the sexual exploitation of children.

9 Those crimes are properly, undoubtedly proper
10 exercises of Congress's authority under the Commerce
11 Clause --

12 **THE COURT:** But someone has to have done something.
13 In other words, you have the statute, you have a number of
14 words put together that are described as being antisocial
15 behavior which we will deem to be criminal and, therefore,
16 punishable but somebody has to have done something.

17 Here the "crime" would be are you going to do
18 something. It is almost an injunctive sort of approach to
19 the situation as opposed to punishing someone or trying
20 somebody and then punishing them for conduct they have done.

21 Here there has been no conduct alleged. You are
22 saying that they look like they might do it some day so,
23 therefore, we are going to detain them.

24 **MS. HONG:** Well, we are looking at the authority
25 question, whether Congress has the authority to prohibit

1 persons properly within federal custody who the BOP or a
2 psychologist or a psychiatrist deem to have some sort of
3 mental illness, abnormality or defect that would make it
4 likely that they would go out and commit sexual violence or
5 molest children, then Congress has the authority to do so.

6 Here we are looking at, when we are examining
7 respondents' challenge here, they're challenging Congress's
8 authority to proscribe this conduct in all circumstances.
9 And --

10 **THE COURT:** They are saying that you do that at the
11 state level, not the federal level. In other words, this is
12 really an exercise of police power. You are proscribing
13 conduct.

14 **MS. HONG:** And if --

15 **THE COURT:** You are not using it as a
16 jurisdictional hook to any interstate travel.

17 **MS. HONG:** Yes. And certainly though the Supreme
18 Court and courts throughout the country have held that the
19 federal government does have the authority in limited
20 circumstances to legislate for the health and mental welfare
21 of individuals.

22 For example, Section -- 18 U.S.C. Section 4246, for
23 example, will allow the federal government to civilly commit
24 individuals who have a mental disease or defect who
25 nonetheless pose a danger to the community.

1 **THE COURT:** But they have to have already been
2 committed.

3 **MS. HONG:** The persons have been hospitalized at
4 some point.

5 **THE COURT:** Hospitalized, yes.

6 **MS. HONG:** But the fact of the hospitalization
7 doesn't inform whether Congress has the authority, the power
8 to legislate and civilly commit individuals.

9 **THE COURT:** Suppose that people are just walking
10 down the street. You couldn't just, you couldn't just say
11 you look like you might be potentially troublesome and then
12 take them off the street.

13 **MS. HONG:** Right. And that is certainly not the
14 statute we have here.

15 If you look at Section 4248(g), for example,
16 Congress has legislated and stated where the federal
17 interest is extinguished, meaning a charge is dismissed
18 because of a reason that is not related to the mental health
19 or mental capacity of an individual, Congress has legislated
20 and stated that the federal government should try to make
21 efforts for states to institute civil proceedings and civil
22 commitment proceedings. And if states refuse to do so, the
23 federal government must release these individuals even if
24 they are dangerous.

25 What Congress has done is narrowly tailor, narrowly

1 draw the lines in a class of individuals who are subject to
2 the civil commitment proceeding.

3 **THE COURT:** Let me ask you the same question a
4 different way, or maybe it is a different question.

5 Under the Necessary and Proper rubric, does the
6 federal government have the authority to pass statutes that
7 would assist the states in exercising police powers over
8 people like this?

9 **MS. HONG:** What Congress must do is hook its
10 Necessary and Proper --

11 **THE COURT:** Not just giving money. In other words,
12 not like all those programs with more prosecutors, more cops
13 on the street, but, I mean, to come up with a, under the
14 rubric of the Necessary and Proper, assisting the executive,
15 like assisting the executive, you know, in the performance
16 of the executive duties? Is that same responsibility and
17 power available to assist the states in meeting their
18 responsibility?

19 **MS. HONG:** Yes. There are certainly some cases
20 that provide for cooperative federalism, cooperative
21 federal/state endeavors. But that's not the statute that we
22 have here.

23 And as you noted, the federal government may
24 certainly assist states with spending clause powers but
25 Congress must tether its Necessary and Proper Clause to one

1 of its enumerated powers, which has been done here, which is
2 Congress's Commerce Clause authority to proscribe certain
3 sexual conduct and then not release persons who are in the
4 federal home, under federal roofs in federal custody, not
5 release those dangerous persons knowing that those persons
6 are dangerous, going to commit the sexually violent acts and
7 child molestation conduct that underlies the federal crimes.

8 The Third Circuit Court, the court in United States
9 versus Perry precisely found that in an analogous situation
10 that for the safety of the community, which is typically a
11 state police power, that the federal government, if the
12 federal government has custody over an individual, the
13 federal government is not bound by the Constitution to
14 release those individuals knowing that they would go out and
15 harm the community.

16 Because in Perry the Congress had authority to
17 proscribe certain drug and gun offenses. Congress then had
18 the Necessary and Proper authority to withhold or hold and
19 civilly commit in effect individuals who would go out and
20 recommit those federal offenses.

21 Similarly here we have Congress having the
22 authority to proscribe the sexual conduct under Title 18
23 because they are Commerce Clause powers and then Congress,
24 therefore, has the Necessary and Proper Clause authority to
25 ensure that those crimes are not committed.

1 United States versus Salerno --

2 **THE COURT:** Where do we go if we do something like
3 this? How long can they be committed? There is no end to
4 the confinement here. What is it, under the procedure it
5 has to be brought to a U.S. District Judge within 75 days;
6 is that how it goes?

7 **MS. HONG:** The 75 days permits the District Court
8 Judge to order a psychiatric evaluation and that a person be
9 committed to a suitable facility for psychiatric
10 examination.

11 **THE COURT:** When is it brought before the U.S.
12 Judge?

13 **MS. HONG:** It is brought before the U.S. Judge as
14 soon as practicable. As soon as the judge, if the judge is
15 not needing, for example, psychological evaluation, once the
16 certification occurs under Section 4248 the Court is
17 required to hold a clear and convincing hearing to determine
18 whether a person should be committed or not. And the length
19 of the detention does not inform the authority of Congress
20 to legislate here.

21 You are correct, it's possible that a commitment
22 could be indefinite. The statute provides that a person
23 shall be civilly committed until either, A, a state will
24 assume responsibility over the respondent, or, B, the person
25 is no longer sexually dangerous to others, either with or

1 without treatment.

2 The respondent is evaluated once a year, at
3 least -- at a minimum once a year by the director of the
4 facility. The director of the facility is required to
5 submit a report to the Court identifying whether the
6 respondent continues to be sexually dangerous or not.

7 The director is also required on an ongoing basis
8 to determine whether someone would or would not be sexually
9 dangerous to others under a prescribed treatment program or
10 psychiatric program.

11 So certainly the length of the commitment could be
12 indefinite, although it also could be much shorter.

13 **THE COURT:** Well, does that sort of indefinite
14 detention serve as a basis for the argument that it is
15 facially unconstitutional because it is not more specific?

16 **MS. HONG:** Not more specific about how long a
17 person can be held?

18 **THE COURT:** Yes.

19 **MS. HONG:** If --

20 **THE COURT:** Shouldn't there be some tethering here?
21 Otherwise, you could throw away the key so to speak. And
22 wouldn't that be an unconstitutional exercise of power?

23 **MS. HONG:** That's not actually provided for in the
24 statute. There is no opportunity to in effect throw away
25 the key. The respondent must be evaluated every year.

1 The respondents themselves have a right to request
2 a court to review their commitment every --

3 **THE COURT:** But, I mean, once it goes to -- maybe I
4 don't understand it. But once it goes to the judge, the
5 judge has 75 days to appoint an expert to give him some
6 guidance with respect to the underlying medical issues; is
7 that right?

8 **MS. HONG:** Not quite. Once the -- so what BOP
9 does, what the Bureau of Prisons does is when a person is in
10 federal custody and about to come up for release, the Bureau
11 of Prisons Certification Review Panel will review whether
12 the individual is appropriate for certification, if there is
13 reasonable cause to believe that the person is sexually
14 dangerous or not.

15 And the Certification Review Panel will issue a
16 certificate stating that in their medical judgment the
17 person is a sexually dangerous person. That certificate
18 then must be filed with the District Court which is what
19 happened here.

20 Once the District Court has that certification, it
21 either has the option of appointing a psychiatric evaluation
22 under Section 4248 or just going forward with the clear and
23 convincing hearing. The Court is afforded at least 75
24 days -- the statute provides for a 45-day period in which to
25 conduct an --

1 **THE COURT:** So you are saying the judge himself or
2 herself is tethered, that you either hire an expert to give
3 you a report or -- which may not come back in 75 days, but
4 if a judge decides to keep it himself or herself, then
5 presumably he has to make a decision within that 75-day
6 period; is that what you are suggesting?

7 **MS. HONG:** It is not -- the statute doesn't require
8 that a clear and convincing hearing occur within 75 days.
9 There is no sort of deadline.

10 **THE COURT:** Well, what is the 75 days? What is the
11 meaning of the 75 days?

12 **MS. HONG:** Yes, the statute provides a 45-day
13 period in which a mental evaluation may occur if ordered by
14 the Court.

15 Then upon good cause a request by the psychiatric
16 evaluator, for example, the psychiatric evaluator may
17 request an additional 30 days in which to complete the
18 report. So there is a 75-day total period in which a
19 psychiatric report and evaluation may be conducted.

20 **THE COURT:** Okay.

21 **MS. HONG:** Once that report is furnished to the
22 Court and the Court is satisfied -- and under that same
23 exact statute the respondents have a right to request their
24 own evaluator who will also conduct an evaluation within
25 that same 75 days.

1 At that point the Court, if it chooses to wait the
2 75 days, may then conduct a clear and convincing hearing to
3 determine whether the respondent is actually a sexually
4 dangerous person, meaning the person suffers from a mental
5 illness, abnormality or disorder causing serious difficulty
6 in refraining from sexually violent conduct or child
7 molestation.

8 **THE COURT:** Okay. You have been working hard here.
9 Why don't we give you a rest for a couple of minutes.

10 What response do you have to some of these points?

11 **MS. MIZNER:** Well, first of all, in response to --

12 **THE COURT:** And let me ask you the leading
13 question:

14 What is wrong with the procedure which within the
15 matter of 40 days from the time of, before somebody is
16 released, gives to a federal judge, the U.S. District Judge
17 the obligation to either decide the validity of the
18 certification or to hire somebody that will assist him in
19 making that decision? What is wrong with that? Can you say
20 that that is an unlawful delay in detention hearing?

21 **MS. MIZNER:** Well, first of all, I think that it
22 would -- we do argue that it violates the due process right
23 to a probable cause hearing within a more limited period of
24 time because the government certification is not a hearing
25 by a neutral detached individual.

1 It is, the government is certifying that in its
2 opinion the person is a, is subject to the commitment under
3 the statute. It does not -- and that's it. It then goes on
4 to go on for the 75 days for evaluation and then whatever
5 additional length of time is necessary for a hearing.

6 **THE COURT:** Are you suggesting there should be a
7 probable cause hearing before this?

8 **MS. MIZNER:** Yes, that's one of the arguments that
9 we made. Due process requires a probable cause hearing
10 before you --

11 **THE COURT:** Is there any precedent for requiring a
12 probable cause hearing involving someone who is already in
13 custody or who is -- one of the categories, the three
14 categories that we are discussing, what is it, Greenwood?
15 Is that the case?

16 **MS. MIZNER:** Well, there are --

17 **THE COURT:** Is there any case that says that there
18 should be a probable cause hearing? And if so, conducted by
19 whom?

20 **MS. MIZNER:** I believe it's Jones which says that
21 there is a -- even though a person is incarcerated that
22 there is an interest in not being transferred, someone who
23 is incarcerated, to the BOP, an interest in not being
24 transferred to a mental institution.

25 **THE COURT:** Sure. I understand that but I am

1 asking you a different question.

2 You are suggesting there should be a probable cause
3 hearing. I am wondering where does it say that and who --

4 **MS. MIZNER:** Well, the statute does not provide for
5 one.

6 **THE COURT:** I know, but where is it read anyplace
7 that there should be one, that it should be in there?

8 **MS. MIZNER:** There are -- it is --

9 **THE COURT:** And who would do it?

10 **MR. EURBGS:** The Court. We are suggesting that the
11 Court would hold --

12 **THE COURT:** The Court would do a probable cause
13 hearing?

14 **MS. MIZNER:** A probable cause hearing as to whether
15 or not the standards -- whether there is probable cause to
16 believe that --

17 **THE COURT:** Well, that is a difference without a
18 distinction, isn't it, because the statute provides for
19 that? The statute provides for the Court to be notified
20 immediately when there has been a certification. And at
21 that moment the judge has the option to conduct his or her
22 own hearing or to marshal some evidence in the form of
23 expert advice from a psychiatrist.

24 **MS. MIZNER:** But the defendant has no right to a
25 hearing at that point in time. Once the certification is

1 provided to the Court, that doesn't trigger any particular
2 time frame for holding a hearing to determine whether or not
3 the person should be held pending the final determination
4 which under the statute requires clear and convincing
5 evidence which, again, we say is --

6 **THE COURT:** Well, it is a question of whether the
7 timetable such as it is in the statute is reasonable or is
8 it so unreasonable as to be unconstitutional?

9 **MS. MIZNER:** And the -- there are two cases that --
10 (Pause in proceedings.)

11 **MS. MIZNER:** There are two cases that are cited --

12 **THE COURT:** Excuse me. Excuse me just a minute.

13 **MS. MIZNER:** -- on page 16.

14 **THE COURT:** Excuse me.

15 (Whereupon, the Court and the Law Clerk conferred.)

16 **THE COURT:** My law clerk wants to make sure that I
17 made clear to you my impression that there is no timetable
18 for a decision in the statute. There is this 40 or 35 days
19 or whatever the initial timetable is but the judge, of
20 course, can take forever to decide the case.

21 **MS. MIZNER:** Right.

22 **THE COURT:** There is no consequence.

23 **MS. MIZNER:** There is no timetable. In terms of a
24 probable cause hearing --

25 **THE COURT:** There is no timetable --

1 **MS. MIZNER:** For the Court's decision.

2 **THE COURT:** -- for a probable cause hearing either.

3 **MS. MIZNER:** There is no requirement of a probable
4 cause hearing.

5 **THE COURT:** No, but, I mean, even in the
6 traditional criminal sense, except for the procedure where
7 after arrest of so many days someone has to be brought
8 before a magistrate judge and all that, is that the kind of
9 procedure that you are relying on? The regular criminal
10 procedure that we have?

11 **MS. MIZNER:** As a matter of due process it would be
12 a question of a reasonable amount, a reasonable time. And
13 in our response there are two cases cited holding that a
14 probable cause hearing must be held within 72 hours of an
15 involuntary commitment, Doe v. Gallinot and Luna v. Van
16 Zandt which are both district court cases, one from
17 California and one from Texas, requiring probable cause
18 hearings for involuntary commitment.

19 But I would like to go back to the Commerce Clause
20 argument that the government is making because I think that
21 they have overstated. Simply because Congress can enact
22 some statute that penalizes, that criminalizes sexually
23 violent conduct doesn't mean, doesn't correlate to a right
24 for the unbridled type of civil commitment statute that they
25 promulgated here. It is not tied, the civil commitment is

1 not tied to someone who has violated or is likely to violate
2 those particular statutes that the government has cited.

3 And, in fact, if you look at the definition of
4 "sexually violent conduct" that they have set out in a
5 memorandum, a preliminary memorandum defining "sexually
6 violent conduct" as any unlawful conduct of a sexual nature
7 with another person that involves certain things that talk
8 about the threat, threatened use of force but others that go
9 on to engaging in any conduct of a sexual nature with
10 another person with knowledge of having tested positive for
11 HIV or other potentially life-threatening
12 sexually-transmissible disease without the informed consent
13 of the other person to be potentially exposed. That is
14 certainly not limited to a federal interest within the
15 Commerce Clause as are the statutes that deal with
16 transportation or crossing state lines.

17 And Perry is a case dealing with the Bail Statute.
18 And it specifically says that Congress may not, however,
19 authorize commitment simply to protect the general welfare
20 of the community at large. And it is tied to the specific
21 offenses in the Bail Statute. Three dealing with drugs, one
22 dealing with the use firearms in the commission of a federal
23 offense.

24 So they're reading the second presumption of
25 3142(e) as addressing only danger to the community and the

1 likelihood that the defendant will if released commit one of
2 the proscribed federal offenses. This statute is not
3 tethered that way. So I would suggest that it is not
4 authorized that the Congress, you can't piggyback Necessary
5 and Proper on to the Commerce Clause in this particular
6 instance.

7 And just as in Lopez the Court didn't say that
8 Congress could not address gun offenses at all. They simply
9 said that that, the particular statute provision challenged
10 there, the school zone, wasn't supported by the Commerce
11 Clause.

12 And here you have, well, perhaps the government
13 could come up with a more narrowly tailored statute that
14 could be tethered to the Commerce Clause, the statute that
15 they passed is not, does not. So we are for those reasons
16 saying that it is not authorized under the enumerated powers
17 of the federal government.

18 And Greenwood which authorizes civil commitment for
19 persons with pending charges and who are mentally ill and
20 incompetent may serve particular -- they talk about certain
21 federal interests, endangering the safety of officers,
22 property or other interests of the United States.

23 The fact that someone may be committed for that
24 reason doesn't translate into this overbroad commitment
25 under 4248.

1 **THE COURT:** The facial challenge, does it have to
2 be to the entire statute or, for instance, just so you will
3 know what I am thinking about, we talked about Greenwood and
4 the three different categories. Two and three, okay, let's
5 say that those pass muster. But what about one, the mere
6 fact that someone happens to be in custody without an
7 ability to stand trial, you know, hospitalization, anything
8 like that, merely in the custody?

9 Now, can we, can she and we deal with that as a
10 discrete issue on a facial basis? Even though two and three
11 might not be unconstitutional, that one might be
12 unconstitutional? Let's say I wanted to do that and I break
13 it up into pieces.

14 **MS. HONG:** That's actually precisely what an as
15 applied challenge does. And the reason --

16 **THE COURT:** Well, as applies does that. But she
17 is -- I keep urging her to cast it as an applied challenge
18 but she says no, it is a --

19 **MS. MIZNER:** No, I didn't say no, Your Honor. I
20 said that we are making --

21 **THE COURT:** You said it is related.

22 **MS. MIZNER:** We are saying that we -- if the Court
23 is, feels that there is not jurisdiction for a complete
24 facial challenge, we would urge the Court to, since all
25 three of these individuals are here only because they are in

1 the custody of the BOP, that the Court address it as applied
2 to that class of individuals under the statute.

3 **THE COURT:** Paragraph one of Greenwood?

4 **MS. MIZNER:** Yes.

5 **THE COURT:** Well, if I do that, why then -- I guess
6 I want -- she answered the question yes and you sort of
7 punted on it.

8 Can I use this facial challenge as a vehicle for
9 declaring it unconstitutional on paragraph one? In other
10 words, the fact that someone just happens to be in custody
11 as opposed to the other two categories enumerated in
12 Greenwood.

13 **MS. MIZNER:** Yes, I think so. The challenges --

14 **THE COURT:** Without it being as applied. It is
15 still the same papers that we have now except that I say
16 paragraph one or is the fact that paragraphs two and three
17 are okay make it fatal to a facial challenge? That is what
18 I am trying to ask I guess. As opposed to an as applied
19 claim.

20 **MS. MIZNER:** Well, first of all, we don't agree
21 that it is okay as to categories two and three. But
22 assuming that it is, then the challenges that we are
23 bringing to the statute, they are facial -- you can call
24 them as applied to this class of people but they apply to
25 all of the people in that class. So in --

1 **THE COURT:** That would be a class of people who are
2 not in the hospital, who are not pending indictment, who
3 have served their time and who otherwise would be on the
4 street.

5 **MS. MIZNER:** Or are being certified solely because
6 they are in the custody of the Bureau of Prisons. And so in
7 that sense it's facial in the since that it plays to
8 everybody in that class.

9 These challenges, there are no -- it is not a
10 question of the individual circumstances in which a
11 particular person is being held beyond saying they're in the
12 custody of the Bureau of Prisons. So that the arguments
13 would apply --

14 **THE COURT:** Could you have a statute which had a
15 certification that would identify the people who are
16 released, if they think they are going to be predators, have
17 them, order them to be registered every place that they
18 live? Over and above --

19 **MS. HONG:** For registration requirements?

20 **THE COURT:** Yes. I know there is a registration
21 requirement; but what about the registration requirement
22 that kicks in to trigger right on their release, the same
23 certification procedure that you are talking about, except
24 it is not to keep them in jail, it is to let them go out of
25 jail but with this identification as being a predator?

1 **MS. HONG:** And it's actually precisely what's
2 required under the Adam Walsh Act, persons who are sexually
3 violent offenders or who have committed certain sex
4 offenses, they're required by federal law to register not
5 only with the federal registry but also comply with the
6 state and local laws. They're called the Smyrna (ph.)
7 regulations that require registration of federal offenders.
8 So, yes, they can.

9 And United States v. Plotts offers another example
10 where persons are required to do something upon release,
11 meaning they're required under the DNA Act, felons are
12 required under the DNA Act to provide their DNA.

13 I just want to go back to one comment about the
14 facial challenge to that first category of individuals, the
15 persons in the custody of the BOP.

16 Another reason why as applied challenges are
17 typically favored over facial challenges which are uniformly
18 disfavored is because the facts of a particular case will
19 inform the legal analysis.

20 There are certainly individuals who are in the
21 custody of the BOP who are aliens. For example, it is not
22 contested that Congress has plenary authority to legislate
23 over aliens. Can Congress legislate and require aliens who
24 are sexually dangerous to others to be civilly committed? I
25 don't think anyone would challenge Congress's authority.

1 They may challenge substantive due process, due process,
2 whatever it may be; but in terms of the authority question,
3 no one would question whether Congress who has wide-ranging
4 plenary authority over aliens, whether Congress could
5 legislate the Adam Walsh Act as applied to that class of
6 individuals. Those persons fall within that first class,
7 the first class being persons in the custody of the Bureau
8 of Prisons.

9 Therefore, on its facial challenge, which is the
10 only challenge they have brought here, it's my understanding
11 that in discussions with respondents' counsel they suggested
12 that perhaps in the future as applied challenges may be
13 raised. But right now all we have is a facial challenge.
14 Under Salerno their facial challenge fails.

15 Respondents also suggest that City of Chicago --

16 **THE COURT:** Wait. Let's go back to where we
17 started. That Salerno standard was called into question by
18 the Morales case; right?

19 **MS. HONG:** It actually wasn't. If you look at that
20 section of the opinion, Justice Stevens wrote for two
21 concurrent, or two justices who joined in the reasoning and
22 one justice who concurred in the judgment but not in the
23 reasoning itself. So three justices were the ones that were
24 questioning whether Salerno was actually the facial test or
25 not.

1 And subsequently in 2002 -- the City of Chicago v.
2 Morales was issued in 1999. Subsequent to City of Morales,
3 in Sabri, for example, in 2004 the Supreme Court
4 unquestionably applied the Salerno standard. Courts since
5 1999, including the First Circuit, have applied the Salerno
6 test for facial challenges.

7 I don't think that one can sort of reasonably
8 question whether a facial challenge requires a respondent to
9 show that it cannot be applied, that the statute cannot be
10 applied constitutionally in every circumstance. And
11 respondents simply failed to do that here.

12 Even if you look at the class of individuals who
13 are within the custody of the Bureau of Prisons, I don't --
14 it's clear under Plotts, it's clear under Perry, it's clear
15 under the Supreme Court's opinion in Salerno that Congress
16 has the authority to prevent danger when it has custody,
17 when it has control over a body of a person who suffers from
18 a mental disease knowing that that person will go out and
19 harm the community.

20 In United States versus Salerno the Supreme Court
21 stated that the government's interest in preventing crime by
22 arrestees is both legitimate and compelling. Chief Justice
23 Rehnquist at the time wrote for six justices stating that in
24 order to protect the community, the federal government could
25 for persons who it held, that it held under its roofs could

1 commit those persons for the safety of the community.

2 If you look at the dissent, Justice Marshall in a
3 footnote states, Preventative danger -- preventing danger to
4 the community is typically one that is a state goal or a
5 state enactment. But Justice Marshall in dissent questions
6 why or how the Supreme Court would allow the Congress to
7 legislate for the safety of the community through the Bail
8 Reform Act. But that's precisely what the Supreme Court
9 allowed in United States versus Salerno.

10 "The government's general interest in preventing
11 crime is compelling," stated the court. And here that same
12 interest is present. This is not about the federal
13 government going and plucking off --

14 **THE COURT:** There is an interest but is there
15 authority under the Constitution? That is the question.

16 **MS. HONG:** Yes. And Salerno answers the question
17 in the affirmative. Perry answers the question in the
18 affirmative. Necessary and Proper Clause jurisprudence,
19 going back to M'Culloch, answers the question in the
20 affirmative.

21 Congress has the authority here to proscribe
22 sexually violent conduct and child molestation. Title 18
23 certainly contains sexually violent offenses as well as
24 child molestation offenses.

25 If Congress has the power to proscribe, Congress

1 has the necessary and proper authority, cabined, of course,
2 by substantive due process concerns, cabined, of course, by
3 procedural due process concerns, but it has the authority to
4 prevent the imminent occurrence of those federal crimes.

5 Here Congress in its legislative wisdom has decided
6 that when it has a person in its custody, persons who have
7 committed multiple rapes, persons who have like
8 Mr. Hendricks, for example, molested hundreds of children,
9 have stated that he cannot control the urge to go out and
10 harm children, that Congress is not yoked by the
11 Constitution from releasing, in releasing those individuals
12 to go harm the community.

13 If Congress has the power to proscribe, it has the
14 Necessary and Proper authority to prevent the imminent
15 occurrence of those crimes.

16 If you look at the federal, their proposed, the
17 notice --

18 **THE COURT:** Well, does that beg the question -- and
19 if you think you have answered this, forgive me.

20 Does it beg the question does Congress have the
21 power to proscribe the conduct that you described here?

22 **MS. HONG:** Mm-hmm.

23 **THE COURT:** Or is that something that is left up to
24 the state? Is it the states that decide that molestation is
25 going to be criminal activity? Where is the congressional

1 authority for that?

2 **MS. HONG:** Right. And Congress has the Commerce
3 Clause power to proscribe sexual misconduct and sexual
4 exploitation of children as it does --

5 **THE COURT:** But that was only -- we went through
6 this. That is only if it goes in interstate commerce. I
7 mean, travel in interstate commerce.

8 **MS. HONG:** That is correct. And because of that --

9 **THE COURT:** Is there any other statute where
10 Congress has said thou shall not do thus and so as a
11 substantive crime?

12 **MS. HONG:** If you look at the Bail Statute, the
13 statute that was examined in Salerno as well as Perry, there
14 Congress has the power and authority to proscribe certain
15 firearms conduct or drug conduct which may also be
16 proscribed by the states.

17 But because Congress had the authority to proscribe
18 that conduct in the first instance under the Commerce
19 Clause, Congress then has the necessary and proper authority
20 to prevent the occurrence of those crimes by holding those
21 persons who have already been in federal custody --

22 **THE COURT:** I can understand that argument. It is
23 the authority in the first place that you slip over very
24 quickly but I don't know, where is the authority?

25 **MS. HONG:** Yeah. If you look at, for example,

1 federal gun offenses, those crimes typically include a
2 jurisdictional prong, an interstate commerce requirement, an
3 element that the gun traveled in interstate commerce.

4 **THE COURT:** Right.

5 **MS. HONG:** Under the Bail Statute because those
6 crimes may be proscribed, Congress may prevent the
7 individual that has already been arrested from going out and
8 recommitting those acts --

9 **THE COURT:** I understand what you are saying. Give
10 me an example of a crime that doesn't have the
11 jurisdictional hook of traveling in interstate commerce.

12 **MS. HONG:** And, perhaps if I make clear, that the
13 sexual crimes that are proscribed by Congress here, those
14 set forth in 18 U.S.C. Sections 2241 through 45 as well as
15 18 U.S.C. Sections 2251 through 52, those contain those
16 similar types of either interstate commerce hooks or hooks
17 that the crime occurred on federal property or in --

18 **THE COURT:** So give me one that doesn't. That is
19 what I am saying. I can understand the argument that
20 Congress can act to assist the enforcement of a statute
21 which it passed proscribing certain conduct. So you are
22 going to give me an example but give me one that doesn't
23 have the, not artificial but the procedural jurisdictional
24 hook of interstate travel.

25 **MS. HONG:** Yes. If there is --

1 **THE COURT:** Something that would be typically
2 thought of as being a statute being passed by a Legislature
3 as opposed to Congress.

4 **MS. HONG:** Yes. And forgive me, I want to make
5 clear that we're not suggesting that Congress has the
6 plenary Necessary and Proper Clause authority to prevent the
7 occurrence of all crimes, whether they're state crimes or
8 not.

9 What we're suggesting here --

10 **THE COURT:** What about these crimes? Let's talk
11 about these crimes.

12 **MS. HONG:** Yes. In these crimes, sexually violent
13 crimes and child molestation crimes that Congress has the
14 authority to prohibit are Commerce Clause hooks, there are
15 jurisdictional hooks to these crimes.

16 Congress has the authority under the Commerce
17 Clause to prevent those crimes. Because Congress has the
18 authority under the Commerce Clause to prevent those or to
19 prohibit those acts, proscribe that conduct, it then has the
20 Necessary and Proper authority to prevent the imminent
21 occurrence of any --

22 **THE COURT:** Even though the ultimate, the
23 initial -- the predicate authority is based on interstate
24 travel as opposed to something that could be more benign?

25 **MS. HONG:** Right. And that's what United States v.

1 Perry and what the Supreme Court implicitly held in Salerno,
2 which is Perry, for example, the court stated that these
3 individuals had committed certain drug offenses, certain
4 federal drug offenses or certain firearms offenses.
5 Congress could nonetheless legislate to protect the
6 community to prevent those types of crimes even if it is
7 swept in from state drug offenses, even if it has swept in
8 some state firearms offenses.

9 When you have an individual in federal custody, for
10 example, if you have someone in federal custody who tells
11 the warden every day, day in and day out, I can't wait to
12 get out because I can't control my urges to go harm a kid,
13 Congress, if it can proscribe that conduct, if he had
14 committed that crime in interstate commerce, certainly it
15 would be a crime under federal law.

16 Because Congress has the power to proscribe that
17 conduct, it can narrowly draw a class of individuals whom
18 Congress may civilly commit because they suffer from a
19 mental illness, abnormality or disorder that will make it
20 likely that the individual will go out and recommit that
21 sexually violent conduct or child molestation that underlay
22 the federal crimes.

23 **THE COURT:** Okay. I think understand your
24 position.

25 Anything else you want to add?

1 **MS. MIZNER:** I'd just like to go back to the -- it
2 seems to me that the government's notion is that because
3 Congress may pass a narrow statute such as one that requires
4 interstate -- that upon transportation in interstate
5 commerce there is a federal offense, that somehow that
6 sweeps in every kind of offense or act that bears any kind
7 of relationship to the narrowly proscribed offense. And
8 that is not as I read Salerno or Perry what those cases are
9 saying.

10 **THE COURT:** She is saying if it is sexually
11 related, I think that is the --

12 **MS. MIZNER:** Right.

13 **THE COURT:** I may not be quoting her correctly.
14 But she is saying that if there is a statute passed which
15 has an interstate hook which makes it a federal statute,
16 proper for Congress to have enacted, that anybody who is
17 leaving jail can be certified if the evidence supports it,
18 by the warden or whoever does it, as being potentially
19 dangerous violating that law.

20 **MS. MIZNER:** That's not what this statute says
21 though. This statute is much broader than that. This
22 statute does not limit the certification to the likelihood
23 that a person will commit the offenses that are listed in --
24 that are listed in the statutes that she has cited to the
25 Court. Just as Perry does not say that because Congress

1 could legislate, can legislate certain drug and gun
2 offenses, that a person who is likely to commit any gun or
3 drug offense can be held by the government.

4 What it specifically says is they are limiting it
5 as addressing only danger to the community from the
6 likelihood that the defendant will if released commit one of
7 the proscribed federal crimes.

8 And here this statute 4248 is not linked to the
9 federal crimes that Congress does have the power under the
10 Commerce Clause to enact. And that that is where it falls
11 short. It is sweepingly overbroad in that respect.

12 If it were limited to those crimes, we may have a
13 different -- we'd have a different statute and we may have a
14 different set of circumstances in terms of Congress's power.
15 But that's not the limitation. It is much broader.

16 If you look at the proposed breadth of what the
17 government is calling sexually violent offenses, sexually
18 violent conduct, it goes far beyond the limited federal
19 jurisdiction under the Commerce Clause for the statutes
20 Congress has enacted.

21 **THE COURT:** Okay. Anything else?

22 **MS. HONG:** Yes. I just want to address that point
23 about Perry. Of course the statute in Perry provided for
24 the detention of persons for the safety of the community.
25 The statute on its face simply stated that there was a

1 presumption that a person would be held pending trial if the
2 safety of the community would be harmed.

3 There is nothing on the face of the statute that
4 stated that it was the proscription of federal drugs or
5 firearm offenses that was at issue.

6 In United States versus Salerno, again I come back
7 to this case because the Supreme Court's decision and
8 holding there informs why it's important for the federal
9 government, why the federal government has a specific
10 interest in narrowly holding those individuals that it
11 already has custody over and who it knows will go out and
12 harm the community's members.

13 One question that has been asked is is there a
14 limiting principle to this. If anything can be sort of a
15 Necessary and Proper -- is anything Necessary and Proper to
16 the power to proscribe. And I think the answer here would
17 be that, Prince, for example, Prince v. United States, the
18 Supreme Court stated necessary and proper causes cabined in
19 effect by other constitutional proscriptions.

20 For example, could Congress legislate to civilly
21 commit kleptomaniacs because it knew that the person had a
22 propensity to go out and commit robberies or steal.

23 Substantive due process, the substantive due
24 process of the Constitution would come in and inform whether
25 Congress could do that or not.

1 Again, could Congress go out and pluck people off
2 the street because it knew that that individual would go out
3 and commit a federal sex offense or a federal child
4 molestation offense? That may be informed by the Tenth
5 Amendment. There it's correct, it's the respondents are
6 certainly correct that typically the care for the mentally
7 ill and the care for the mentally infirm is something that
8 is left to the states.

9 In certain circumstances, however, for example,
10 where the federal government has custody over the person's
11 body, actually has withheld that person from society and
12 from harming society, in those circumstances the federal
13 government has an interest not to release persons knowing
14 that they will go out and harm the community.

15 The Tenth Amendment would be a limiting principle
16 to the Necessary and Proper Clause argument.

17 **THE COURT:** Okay. Anything else?

18 **MS. MIZNER:** Well, just going back to the Bail
19 Statute, since that's the, since Salerno and Perry are both
20 dealing with the Bail Statute, I just want to make it clear
21 that if you look at the Bail Statute is the detention
22 hearing -- detention under the Bail Statute is limited to
23 persons who are charged with very narrowly defined offenses.

24 And in Salerno the Court notes that the Bail Reform
25 Act carefully limits the circumstances under which detention

1 may be sought to the most serious of crimes. And it lists
2 the offenses, the offenses are listed in the statute.

3 So it's not a general we can hold someone who is in
4 federal custody if they are going to be a danger simply
5 because they're in federal custody because they're charged
6 with committing a particular offense. It has to be tied to
7 that offense.

8 **MS. HONG:** And the Court in Perry actually
9 expressly rejected that. The court stated a short term
10 civil commitment is Necessary and Proper for carrying into
11 execution the powers of Congress, it is not immediately
12 apparent why a long-term civil commitment divorced entirely
13 from Title 18 of the United States Code would not equally be
14 so.

15 The court continued, "The civil commitment for the
16 safety of the community must be analyzed independently of
17 the criminal charge." That's what the court did in Salerno
18 and that's what the court did in Perry which informs why
19 this statute is a constitutional application and exercise of
20 Congress's authority.

21 And, again, I just want to go back. Again, this is
22 a facial challenge by respondents suggesting that in no
23 circumstances may Congress have the authority to promulgate
24 the act. That type of broad challenge simply cannot prevail
25 here.

1 **MS. MIZNER:** Your Honor, we're willing to have you
2 consider it as applied to the class of people who are before
3 you today, the class of people who are in the custody of --

4 **THE COURT:** Well, I don't know if I am going to
5 change it in the middle of the hearing. I think if they --
6 I am not saying what I am going to do anyway, but it may be
7 that we should focus another day on another challenge.

8 But I am not going to at this, in the middle of the
9 hearing change it from a facial to an as applied. I don't
10 think I am anyway.

11 But let me tell you, thank you very much for a
12 wonderful presentation, both sides, very helpful and you
13 were very well prepared, very professional. We appreciate
14 it very much. And I will do the best I can with it. All
15 right.

16 **MR. SINNIS:** Judge, can I ask one question, Your
17 Honor, about my two particular clients, just for some
18 guidance from the Court?

19 Mr. McRae and Mr. Graham are D.C. violaters who are
20 in federal custody, based upon the fact they were D.C.
21 violaters when transferred into the Bureau.

22 I intend to brief the issue as to whether this
23 statute applies to these two individuals. Would it make
24 sense for Your Honor to rule on this and then have a
25 briefing schedule then or should you set a briefing schedule

1 now on this?

2 **THE COURT:** Why don't we wait.

3 **MR. SINNIS:** Okay.

4 **THE COURT:** All right.

5 **MR. SINNIS:** And as to that, Mr. McRae filed a
6 declaratory judgment pro se. He is willing to withdraw that
7 today with leave for me to refile it under this direct
8 challenge as it applies to these two individuals.

9 **THE COURT:** Why don't you do that. Do it that way
10 so we have a paper record of everything that is being done.

11 **MR. SINNIS:** Okay. Thank you, Your Honor.

12 **THE COURT:** Anything else?

13 All right. Thank you, everybody.

14 **COUNSEL:** Thank you, Your Honor.

15
16 (WHEREUPON, the proceedings were recessed at 1:00
17 p.m.)
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C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

CAROL LYNN SCOTT
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DATE: September 10, 2009